Federal Court ~ Aboriginal Law Bar Liaison Committee

Symposium on Oral History and the Role of Elders

April 7 -8, 2009

Ottawa, Ontario

MINUTES

ATTENDANCE

Federal Court
1. Chief Justice Allan Lutfy
2. Justice François Lemieux (co-chair)
3. Justice Robert Barnes
4. Justice Leonard Mandamin (co-chair)
5. Prothonotary Roger Lafreniere
Courts Administration Service
6. Michelle Casavant
7. Jesse McCormick
8. Andrew Baumberg
9. Adriana Jasenica
10. Marianna Ruspil
11. Gillian Fattal
12. Ashley Smith
13. Suzanne Labbé
Specific Claims Tribunal
14. Wayne Garnons-Williams
Department of Justice
15. Kathy Ring
16. Ainslie Harvey
17. Owen Young
18. Ron Stevenson
19. Vivian Russell
20. Robert Winogron
21. Éric Gingras
22. Mary Tobin Oats

Elders
23. Frances Guerin
24. Dave Courchene Jr.
25. Stephen Augustine
26. Francois Paulette
27. Morris Little Wolf
28. Marge Friedel
29. Gordon Lee
30. Chief Reg Crowshoe
31. George Calliou
Indigenous Bar Association
32. Sa'ke'j Henderson, I.P.C.
33. David Nahwegahbow, I.P.C.
34. Candice Metallic
35. Catherine Twinn
36. Katherine Lickers
37. Sharon Venne
38. Deborah Hanly
39. Carolyn Buffalo
Canadian Bar Association
40. Aimee Craft
41. Christopher Devlin
42. Gaylene Schellenberg
43. Robin Campbell
44. Philip Healey

DAY 1 - MORNING
An opening prayer was offered by Elder Gordon Lee.

Participants were then welcomed by Justice Francois Lemieux, who also thanked Chief Justice Lutfy for supporting the creation of this Liaison Committee, with members of the Court, the Department of Justice, the Indigenous Bar Association, and the Canadian Bar Association. The mandate of this Committee is to make the court more efficient, more effective, and how to improve the rules of procedure. Initial work of the Committee has been on draft practice guidelines, and the next focus is on treatment of oral history and Elders, the role of Elders, Elders as experts, respect that Elders command in the community and in the court. The Symposium's agenda will serve as a foundation for the next phase of guidelines, providing preparation for next meeting on June 11 in Victoria. There are numerous pronouncements by the courts on evidentiary issues, and it was noted that there is less flexibility within this committee to address some of these substantive law jurisprudential issues.

Justice Mandamin added that the practice guidelines are a work in progress for matters involving aboriginal litigation. There has been an attempt to identify areas where there is substantial agreement, and to clarify the difference between Elders giving evidence and 'academic expert witnesses' giving evidence.

Justice Lemieux then provided an overview regarding proposed changes to the Rules on expert witnesses being considered by the Rules Committee. These changes do not apply specifically to Elders, though leave open the possibility that an Elder might in some cases fall within the 'expert witness' category. Elder testimony is a *sui generis* category – this was recognized by rules sub-committee: this is special testimony that deserves special attention. The normal rules for witnesses in general apply, but also noting that an Elder is a special witness.

Professor Henderson was then invited to present his paper and offer participants his perspective on Elders.
- Elders provide a new, distinct, Constitutional voice that has not been heard, one that the courts have difficulty describing, so they use latin: *sui generis* ("self-generated")
- since 1982, when aboriginal and treaty rights were enshrined in the Constitution: *how do courts use rules / procedures to receive evidence and decide on aboriginal rights?*
- the Supreme Court concluded that traditional evidence law is not appropriate: rules of evidence must be adapted by the judge to take account of distinct traditions behind aboriginal and treaty rights
- this must be done in a broad and flexible manner, putting tension on the judge
- in answer to questions as to whether adaptations are impartial and really consistent with aboriginal traditions, many studies show the justice system's failure to reconcile aboriginal and Eurocentric world-views
- in discussions with Elders about aboriginal traditions: you are in aboriginal 'house,' with different rules and traditions, very different from non-aboriginal approaches
- European countries very good at "adopting traditions and then forgetting them"

- perspective on the Federal Court – this is a small group of nomadic judges, travelling across the country, searching for justice for the Crown
- aboriginal peoples are the only residents of the federal Crown – other areas of jurisdiction are *topics* rather than *people*
- when aboriginal peoples look at the courts, they look at actions (verb-oriented), with the entire court divided between "talkers" (lawyers) and "hearers" (judge), who is also a "ceremonialist," continuing the ceremonies and protocols, and sometimes the ceremonialist is also the decider, which doesn't exist in aboriginal tradition
- another role is "readers" (appellate court) who don't hear much, but read everything
- there is also a more mystical role of shaman, who is not constrained by any rules – this is close to the role of the Supreme Court judge
- when Elders come to court, they carry Constitutional supremacy and aboriginal rights with them, the power to explain aboriginal traditions, which no-one else can do – they have Constitutional voice that in a federal system is considered superior to other rules
- Under the Constitution, no one element can trump another – the aboriginal and treaty rights can't trump section 101 and the creation of the court, but the Federal Court rules must also be consistent with the aboriginal rights
- if the law is inconsistent with the Constitution, the Supreme Court can hold it invalid, though with temporary delay to allow reconciliation: this is the new duty of the judiciary in constitutional supremacy, a significant departure from the parliamentary supremacy that existed pre-Charter
- Constitutional supremacy applies to everyone *without exception*
- rules of evidence are not consistent with aboriginal and treaty rights (per Supreme Court in Delgamuukw and Mitchell)
- We know that the rules of evidence are not impartial and not universal – they are biased against aboriginal Elders and the knowledge that they carry
- We can't in one step sweep away old rules, and so the judge must adapt case-by-case
- Sparrow concluded that federal power must be reconciled with duty to protect aboriginal and treaty rights – the Court said we must be "sensitive" to these rights
- In Delgamuukw – the Court said that you must adapt to aboriginal legal traditions
- Presentation of these perspective is usually through presentation of Elders to describe the traditions, though this has been very difficult
- federal *Evidence Act* must be consistent, but no court has ever found the Act to be inconsistent / invalid, though judges must have enough information to adapt the code: *is evidence code consistent with aboriginal and treaty rights?*
- Courts have said that there is protected core of "Indian-ness" – to aboriginal peoples, this is called aboriginal sovereignty, natural law
- this is not raw power, but the beauty of proper relationships between land and people
- re *sui generis* evidence: *how do we give judges enough knowledge so as to be able to adapt evidence code, consistent with both aboriginal and non-aboriginal traditions?*
- Federal Court can take traditional notice of any statute, but not of aboriginal treaties, which must be proven – this is bias towards Crown laws
- Crown has not published imperial treaties, which are not even listed in section 52(2) that lists Constitutional acts the Crown is quite lax in this regard
- in most treaties, there is consensual agreement about dispute resolution between aboriginal / non-aboriginal peoples

- Re Wabenaki confederacy – rather than take an English person into their own justice system, the confederacy agreed that the English had their own justice system – under the agreement it was understood that they would take their disputes to British courts
- the first Chief Justice spoke with the MicMac in 1760 to discuss what the relationship with British Crown meant: "the MicMac must build a wall between their legal system and British rights"
- however, there was concern that aboriginal legal traditions would overcome the rights of settlers, so the wall became very high, and we are now trying to create a bridge
- important to look at Victoria-era treaties, by which treaty chiefs agreed to keep peace and good order in lands ceded to Crown and to assist officers of Her Majesty to bring to justice any Indian who breached the treaty
- so, when an Elder comes to court, they are the person who is aiding the judge (officer of Her Majesty) as part of the treaty obligation – *this is shared responsibility*
- the Elder is not a lay witness – this is their obligation *under the treaty*
- distinction between religious – secular perspective: Elders bring knowledge of traditions as sacred knowledge, which has been recognized by the courts
- aboriginal communities do not have a separate study of "history" – their traditions, philosophy, stories, law are all bound together in sacred knowledge
- the courts have demonstrated the highest honour of the Crown as the keepers of the law, even where this honour is not always shown in other areas
- the courts often encourage aboriginal issues to be resolved *outside the courts*, because litigation is not a good solution
- the courts don't know how to deal with situation - similar to the political challenge at confederation, where the aboriginal issue was found to be difficult
- there is an obligation on the judge to find ways to adapt rules of evidence, and there is discretion in rules of court to do this
- *Is this ad hoc adaptation of rules impartial, is it biased?* The question brings in rules of bias that control the rules and decision-making process. *Is conduct of court fair, does it appear to be fair?*
- for Professor Henderson, trained in both systems, it does not appear to be fair, as there is a strong bias towards the Eurocentric perspective
- there is a need for a broader process of reconciliation – the judge must deal with some difficult baggage, including racism (systematic and personal), the legacy of colonial / Eurocentric views of aboriginal peoples as barbaric and uncivilized
- Courts have had numerous examples, including:
    - 1929 decision that MicMac didn't have sovereignty because not civilized
    - recent Calder decision criticizing lower court characterization based on Eurocentric thought
- Mitchell confirmed that we have to overcome these underlying biases and need to open mind to different perspectives
- Eurocentric system of knowledge is built on denying aboriginal system of knowledge – there needs to be ambidexterity of mind to treat different perspectives
- Aboriginal peoples have to do this all their lives, living in Eurocentric institutions
- Court must also do this to better understand traditions, knowledge, language
- Language is difficult (e.g., discussion today is translated into English – challenging)

- example of recent Hobbema case, with numerous interpreters for Elder testimony in Cree – there was very significant variation between the different translations
- if translation is so difficult today, it must have been even more difficult at time of signing of treaty: Cree is verb-oriented, not noun-oriented as European languages
- justice is verb and must be *done*
- Eurocentric interpretation of aboriginal oral tradition, knowledge and law is very narrow and often misses much
- aboriginal system is one of performance law, allowing everyone to remember the code of behaviour – it is performance based in song, story, dance
- there is no law-giver, but everyone acts out the law, which are translated into custom
- similar to court as performance of rules of law

Justice Lemieux thanked Prof. Henderson for his thought-provoking remarks, which opened many perspectives and the view that "we have a problem." In terms of how aboriginal evidence is presented, accepted, brought into evidence, there is a burden on the judge: the Supreme Court said to reconcile traditions, but without much indication how. He then asked for clarification re comment that the courts' system of rules of evidence is a denial of aboriginal system, noting that there is enormous flexibility in evidence (e.g., courts find that hearsay evidence is not ground for inadmissibility). The Supreme Court has said in many cases that the trial judge must weigh the evidence, and if there is error, this is a ground for appeal.

Prof. Henderson responded that the issue is mostly the fetish with *text* as opposed to *performance*. Two hundred years ago, the common law started its movement to text, but previously, *performance* and *orality of court* dominated. Everything now is mostly text, with little room for oral presentation. This is a *hearing* room, but very little is done *orally*. There us a strong preference for text, allowing regulation of people through literacy. An elder is a library, but the courts have trouble negotiating this approach, and instead ask for paper. There is almost no room in text of *Indian Act* for treaties, which doesn't acknowledge any separate decision-making process. The Courts often don't recognize independent decisions under the treaties, but instead look to authority delegated under the *Indian Act*. Treaties delegated specific powers to the Crown where it had none and were to reconcile pre-existing sovereignty of aboriginal peoples with asserted sovereignty of crown. The courts, though, often start with authority of crown without asking where the crown received its authority. Aboriginal peoples had to wait until 1982 to have Constitutional recognition of their authority. In sum, there has been a form of "common law colonization" – few courts actually protect aboriginal rights, with protection a theory, not a fact.

Justice Lemieux commented on the obligation on judges to reconcile these different rules of evidence, as the Supreme Court did not provide guidance. *Perhaps it is better to have negotiation, with the judge as referee?*

Prof. Henderson agreed that the Supreme Court provided a few rules, as vague as the *honour of the Crown*, but no real guidance. The honour of the Crown is unclear, based on memorialization of what is good in the law, but was left to those involved in the justice

system to give it reality. Those who teach law need a lot more clarification, but the Supreme Court is not open to a reference on this question. Peace-making courts were created by aboriginal peoples, a very different approach than the adversarial system. The aboriginal perspective is difficult to convey in the court process, as there is limited time. Aboriginal lawyers are now bi-jural, bi-cognitive, but don't have the full picture, as they are still new to this.

Mr. Healey noted that there has been guidance from courts re admissibility. The real struggle for judges is to treat oral history as evidence of *fact*, not *opinion*. It is difficult to hear stories & songs and understand them. If the question is to determine the meaning of a treaty (whether peace treaty or surrender), it is necessary to reach conclusion on facts, and so the judge needs to hear these stories & songs and be able to translate them into facts. When Elders give evidence to the Court and it is unclear, the judge must ask questions – there is so much difference in culture, it is difficult to understand. The obligation is on lawyers to present their evidence, but there is nothing wrong with a judge asking a question – everyone is there to try to reach the best understanding possible.

Justice Lemieux agreed that it is the duty of the lawyer in an adversarial system to ensure the judge understands.

Justice Mandamin raised a question regarding judicial notice of treaties, which are more than simply documents.

Professor Henderson noted that the existence of a treaty is the starting point. Even the original document is often a point in question that is contested, and there is very little help from archivists. Often there are different copies, with different punctuation. Sometimes there was separation of individual treaties into two documents (obligations of the Crown, obligations of the First Nation). The document is a starting point for an exchange on the meaning and interpretation of the treaty. He has never heard of a case where the aboriginal group denied the *existence* of treaty – it is an issue of *interpretation*.

Ms. Oats noted that this issue of questioning the existence of a treaty raises the issue of the honour of the Crown. *Is this honourable? How does this put into action the honour of crown?* Issues of evidence are closely related to the honour of the Crown. How do we uphold honour of the Crown and the majesty of the Court while denying evidence of aboriginal peoples?

Prof. Henderson responded that the honour of the Crown is very new. For a long time, the Crown has often challenged treaties. However, he has no similar experience of Elders being dishonourable and denying existence of treaty – they always affirm the existence of treaties as sacred.

J. Barnes commented regarding the unique nature of Elders' testimony. Why is this a special, *sui generis*, category? Proof of all ancient facts is through hearsay. Elders simply have a different tradition of bringing this hear-say to the Court. Why should it be treated differently than a historian from a university who speaks to this as an historical fact?

Professor Henderson responded that Eurocentric thought allows for facts to exist without underlying theory. However, Elders provide knowledge of the normative order. They are not brought in to prove that their ancestors signed a treaty, but to explain what their ancestors thought of the treaty *from their perspective*. It is often not an issue of proof of a fact. In many cases, there is negative evidentiary challenge because much of the written record is translation from aboriginal culture into academic framework – there is no written equivalent within aboriginal knowledge culture. In aboriginal culture, knowledge comes through a person, not through a degree / document system. However, one needs to understand the language and its structure in order to understand the testimony. It is like trying to understand a symphony from looking at the musical score, but without an understanding of the relationship between the different parts of the orchestra. Aboriginal notions of truth require a process of engaging with many people, but without any one holding the truth. How does one know a fact? There is a significant challenge regarding the qualification of the true meaning of a fact.

Chris Devlin referred to the *Canada Evidence Act* as well as the *Federal Courts Act. What are possible suggestions for amendments that would allow reconciliation of these different perspectives? Is there a possibility for recognition of aboriginal law through a statutory enabling frame-work?*

Professor Henderson agreed that this is a good idea, and is not sure why B.C. didn't do this after the Delgamuukw case. Recognition would need to rely on two approaches, one statutory, the other requiring involvement of aboriginal peoples under section 35. This second requirement involves a dialogue.

Justice Lemieux provided an example of codification of common law into statute (e.g., negligence stature codified numerous common law principles). *Is that what we are discussing – possible codification of dialogue re aboriginal rights?*

Mr. Devlin responded that he was suggesting instead a statute that more clearly recognizes a space to allow aboriginal evidence.

Professor Henderson indicated that this was part of the goal for the amendments in 1982. However, the Crown chose to challenge aboriginal peoples trying to assert the rights protected under section 35 (e.g., right to fish and sell fish). This is the first generation of aboriginal lawyers (there were only a few in the 1970's, whereas now there are about a 1000). We need a more mature community of aboriginal lawyers to attempt codification of laws – this is for the future.

Mr. Nahwegahbow noted the earlier discussion regarding the Constitutional nature of this issue. *Why are Elders different from other witnesses?* In part because they are a "Constitutional voice." This remains a challenging issue – are they like judges, legislators, witnesses? He emphasized the role of judges to ensure that the Constitutional aspects of cases are recognized and that the procedure is consistent with the Constitution. This is a significant challenge – the aboriginal perspective must get equal weight, but

without detailed guidance. You can't understand another culture with only a short visit. What can lawyers do to get a better understanding of aboriginal perspective? There is an issue of partiality / impartiality, as judges retreat to that with which they are comfortable. Needing corroboration, often an expert with a PhD is given more weight.

Professor Henderson stated that you can't tinker with the rules of evidence to make them consistent with aboriginal tradition. The existing process relies on text, and raises issues of reliability / relevance. There is nothing more powerful than the *status quo*. It is difficult to enter another community's "house" without understanding the language. He provided an example of a Cheyenne project to develop a "reader" for school. There was a 3-year project studying language. The Elders had to explain to the academics that many words described an action rather than subjects of the action – there was considerable misunderstanding among non-aboriginal speakers.

Ms. Metallic commented on the proposal to codify aboriginal law, noting as an example amendment to the Canadian Human Rights Act (section 67). The initial amendment was 3 paragraphs long, a simple abolition of the provision. The Assembly of First Nations entered a dialogue with the government regarding the consequences and the need to weigh different perspectives. The new amendment creates a process for balancing of rights, an important step. There is a role for Elders to assist with resolving disputes.

DAY 1 - AFTERNOON

Justice Mandamin introduced the afternoon session, acknowledging some participants:
- Mr. Roy Barnes, a helper for Morris Little Wolf to set up sweat lodge and tobacco
- Mr. George Calliou, who is learning the teachings of the Elders

He then offered a gift of tobacco to the Elders on behalf of Court and acknowledged that there is a medicine bundle at gathering today.
Mr. Calliou gave a gift of tobacco to members of the Court, to the Elders, and to other helpers. Justice Mandamin then made a formal request to the Elders to help understand the world from their house, to better understand their people, and to do justice.

Elder Stephen Augustine noted that, given time, he could speak for seven days, but he has less time and so has prepared a written text, adding an old expression that he had once heard: the "brain is only good for tanning hides."

Elder David Courchene acknowledged the grandmothers present, who have the gift of life and of knowledge, and spoke of the "law that is given to the child that will last forever, that can only be given by the mother." Today's event is part of the fulfillment of the vision of our peoples to be heard one day. White brothers arrived with "gifts of mind and of fire," able to use these to create and to write. Aboriginal peoples were given "gifts of spirit and of the earth." He spoke of the treaties, a relationship of respect. These have not been honoured, noting that there have been many casualties, of great poverty, and the need for sharing the great wealth of this country. European ancestors needed the

aboriginal peoples. An Elder once said that "we adopted them" – this needs to be remembered. The role of men is to be inspired with vision, and to understand the need to protect life, as understood from mothers' teachings. But many men have failed this, because they seek to control. Instead, they need to provide real support for children. We should be proud to bring forth spiritual teachings. We are in one boat together, with uniqueness of the gifts given by the Creator. "I will go in this boat if allowed to bring teaching, songs, traditions." He invited those who are enforcing laws of Canada to come to "our houses" – they will be welcomed and offered gifts. It is important to consider the possibilities of what can be created together, with a spirit of respect. *Can we find this in our hearts?* This opportunity to meet is deeply appreciated.

Elder Morris Little Wolf began with story of a white man who noted that Indians had great a spirit of laughter, and so told an entertaining story from early the 1900's of a granddaughter who left to Montreal and then returned home. He went on to note that the Elders to whom people go are those who have lived through hell as children (reference to the residential schools), the survivors of what happened in this country. Elders see the hurt of their people, of the youth. He told the story of 1877 treaty, when representatives of Queen stayed all summer. The meaning of Treaty 7 agreement was one of higher power, it offered peace. And so the young people don't understand why this law is changing, despite the promise between two peoples ("as long as the river flows, the grass grows, the sun shines, this will always be your way of life"). When you come to me as Elder, I see you as a son or daughter with a problem. Let us go back to re-negotiate and talk as people, not go to fight in court. We need to bridge the gap between peoples so that we can live together. Are we here for ourselves? No, we are here for the future generations. Children are losing their lives because we are not working together. Let us build a new community that we call Canada, regardless of the four colours. When we leave this earth, we take nothing, but leave everything for our children. We are going overseas to help, but why can't we help our own children. A grandfather said, I can only speak once, the rest is yours; I can only work once, and then when I am old it is yours. Let Creator's children work together.

Elder Gordon Lee spoke of a gathering of Elders in the 1970's when he was much younger. None of the Elders spoke English, none had gone to school. The interviews were translated and then published in book edited by Richard Price – Spirit of Alberta Indian Treaties. He studied treaties 1 – 8: many promises were not written down, such as one previously mentioned, that the treaty would last as long as the sun shines, the river flows, and the grass grows. He wondered whether the treaty commissioners understood what this meant to our people. The sun gives us life, as does the water. The commissioners probably would not understand. We always honour the sun, the water, the earth during our ceremonies. Statutes of limitations should have no effect on treaty promises – these were to last forever. In Delgamuukw, treaties must be interpreted as the Indians would have understood them, which is 'as they were heard.' He went on to quote some of the different commissioners about the treaty process, having read through books about the different treaties to see if he could add weight to what the Elders had said.

- treaty 1 (Commissioner Simpson) – your Great Mother will lay aside land to be used by you and your children forever, and we will not allow others to incur on the land and will make rules to protect it forever, so there will always be a place to call home
- treaty 4 (Commissioner Morris) – I offer this to you while the sun shines … these are not for today only, but tomorrow; not only for you but for your children, as long as sun shines and water is in the ocean
- treaty 5 – similar to other treaties
- treaty 6 – similar reference to continuation as long as the sun shines
- treaty 7 – you see the palm of my hand, and that is where the Queen will hold you; look at the mountains, and that will be the law, as long as the sun shines
- treaty 8 (Commissioner Thibault) – Indians would get everything in perpetuity

This is how they understood the treaties, even if the terms were not written in. Other terms were noted that were not included in treaties, such as that only the depth of a plough was surrendered, because the treaties were because the Queen wanted to open up land for settlement and immigration. Research by Professor Kent McNeil concluded that "settlement" does not includes minerals, resources, but was only meant for agriculture, and so far what Professor McNeil has found adds great weight to the oral history of the Elders. Finally, Mr. Lee spoke of his grandfather who raised him, who would tell stories, but would always say who had told him the story, sometimes 3 generations back. We should not make someone lie who is now dead – we must tell the truth.

Elder Francois Paulette spoke first about who he is, where he comes from, and his history (he is the Paulette from the Paulette case filed in 1972), and of "the path we walk." There are four central tepee poles to represent the spirit, heart, mind, and body. The land is sacred, and all is holy. Our house is quite different than your house, because our thoughts are different – always in a cycle, whereas your systems are linear. He was asked at 21 to become chief, in a line of leaders on maternal and paternal sides. The Paulette case asserted title to all lands in the treaty area. From the Crown's perspective, the treaties were fraudulent (in the original text of treaty 8, signatures were all annexed by the same person). Justice Morrow came into our house and sat equal with everyone. One of the oldest Elders, who had witnessed the signing of treaty 11, was to testify. The Crown prosecutor questioned him, sometimes aggressively, quite belligerent. The Elder stopped the proceeding and asked the interpreter: "by the way, who is that priest who is questioning me?" Justice Morrow ruled in our favour. To the Dené, this still stands today. He then spoke of another inquiry when a judge came to our house: Justice Berger came, when they were looking to destroy our land. When we take caribou, we take everything, and it is sacred offering. Nothing is wasted, and we take pride in this. The world view though of these businesses is to come in and take small piece of diamond and throw the rest away. Justice Berger spent two years in our territory, in our house, and favoured our position. Today, the Federal Courts, the provincial courts, they will not come to our house – they don't do this. He then mentioned the Benoit hunting case, where there was testimony about treaty rights, and the Elder won the case. He also noted the Benoit taxation case – taxation touches the core of our society. In the treaty 8 text, there will be no imposition of any tax, as written in the Crown's version – this was promised. In our language, there is no word for "tax" – the closest word is "to take back from you." This is great dishonour, to give and then take back. Even though our Elders testified, the

Supreme Court ruled against us: this was a political decision that would have changed the way Canada dealt with Indians, including the Jay treaty and others. He then spoke of his understanding of court terms / roles. We work towards reconciliation, not punishment. Last year the Prime Minister apologized for all injustices done since arrival on this island: this is a good place to start, but there is a lot of work to be done. The treaty is living document, but the position of the Crown is surrender / extinguishment. This is not part of our reality; it is a denial of the sacred existence of the land. Parliament should abolish this position. In the 1800's and before, there was a termination / genocidal policy to eradicate Indians; they gave out infested blankets. As a 6-year old child, he was taken from his home against the will of his family to residential school, spending 9 years there. If we could not be destroyed, they tried to assimilate us. He spoke of the Bible in school and the ten commandments: "thou shalt not steal." But they took our land, took children from families, in direct violation of these commandments. He then spoke of a son who was born with liver disease and needed a transplant, eventually dying. The Creator made things this way, but the doctor from Edmonton would not accept the situation and took the case to court. Mr. Paulette argued only the physical risk for his son to undergo the operation, and won the case, but was angry with court system because he spent more time with the courts than with his dying son. Our world is very different than yours. He then discussed a recent tax case of a woman who earned money through the treaty office – this should have been exempt per the *Indian Act*. He testified and the case was won at trial but then lost on appeal. "There is something wrong where I can speak at trial but am not allowed to speak on appeal and cannot attend at the highest court in the land. This is wrong. Elders should be able to speak at appeal courts, as Elders are the law of the land in our house."

Elder Marge Friedel noted that when we sit in circle, we are all equal. She spoke of Spirit Lake, where she grew up. We are Métis and didn't have land. She was initially hesitant to accept invitation, knowing very little about the Courts. "It is a different house, I don't know if I am welcome, of if I have anything to contribute." She thanked the Creator - things happen for a reason, and that is why I am here. She spoke of work as "grandmother" in a school with displaced children and of the struggles of the Métis. Every time new settlers came, we were pushed from our land. Treaties were promised, but never came to pass, and so we resisted, but this was called rebellion. She is working on a project with the Alberta Department of Justice and different aboriginal groups to help aboriginal children, trying to change perspective of the aboriginal curriculum. There is a need to change the stories passed on to children. Teachers have education, but they have never been taught about aboriginal history and don't know the real story. Where she was born, sometimes there were 6 generations living together. There was a lot of Catholic influence, but they didn't speak English, instead a mix of "michif" (that is, a mix of many different languages, including Ojibwe, Cree, Irish, English, French). She was sometimes told that she was not white enough for this world, sometimes not brown enough. Up until 1982, the Métis were not recognized, apart from the fraudulent scrip, one of the largest fraud cases in history – given a piece of paper and told that you "own" land. This divided families – some took scrip, others took treaty. "The creator gave me the right to walk in both worlds." The Pauley case was a breakthrough, but now there is a need to negotiate province by province. The new government Minister of Natural

Resources in Alberta terminated a harvesting agreement and tried to define who is Métis. She described a difficult process to get an eagle feather through the Ministry office: they denied her request and told her that Métis culture 'does not include eagles,' and it was illegal for her to be given a feather by anyone else. She replied that an eagle may give her a feather, and they could then charge the eagle. There are numerous charges against Métis, and to defend themselves against these charges, it is a very expensive "house" in which to live. Rights have been trampled by the Minister of the Crown. Regarding experts, she remembers listening to Elders doing their teachings and stories, which are remembered through the memory in the blood of ancestors.

Elder Frances Guerin indicated that she was from the Musqueam people. There was no treaty for majority on the west coast. There has been considerable resistance by the government to establish a land base for our people. The Court system is adversarial, and often Elders have had to come forward, which is very difficult for them; it is the ultimate win-lose system. If it is a special claim, with an Elder as witness, he has to put trust in the hands of the judge that he will be able to communicate the meaning of our stories. She noted that this is a system where experts are allowed to challenge, in writing, the testimony of an Elder, without an opportunity for the Elder to respond. Historically, in B.C., there is little regard for the needs and life of native people. Our reserves are the smallest across Canada; the land base will not meet the needs of the people. Land in her area is very expensive – few can afford to live there. The Court system is foreign – in the short time available, it is almost impossible to achieve understanding. We need to change this – we go to court only as last resort to defend our rights. The Band is in a bad financial system due to having to be in the courts so often. We live in the most expensive part of Vancouver, with considerable prejudice / racism encountered daily, as early as at the age of 5. They are not equipped to deal with this, and so our children don't get past grade 7 or 8. We are a people who have a right to survive – we are not going to assimilate and give up our culture. She does not like the term expert witness. Elders should not have to be on trial for their teaching. They should be honest and person of integrity; one should not question their teaching, which is their foundation. We need more time to have focus on how to overcome the situation, and need a little integrity on the part of the Canadian government, which would assist greatly.

Justice Mandamin thanked the Elders for their teachings, and Justice Lemieux added that it is not only the Court helping, but for the Elders to help the Court.

Mr. Calliou noted problems with the term "aboriginal." There is a need to go beyond this to reflect many different languages and the law of land. He offered thanks for the coming together of two houses – a bridge is needed so each can cross, for young people and those still to be born. Warriors need to join forces to fight for justice.

DAY 2 - MORNING

Participants were welcomed by Justice Lemieux, who acknowledged the work of Ms. Casavant and Mr. McCormick to prepare working papers on four issues.

Justice Mandamin then presented the first issue on the agenda: Who qualifies as an Elder? He noted that there is considerable difference from region to region, and not all Elders have the same role. It is the traditions of the First Nation that give the Elder authority to speak. Feedback from Elders indicates that no one Elder has the entire story. Elders often identify who told them their stories, and they do not want "to make a liar" of someone who has now passed on. When an Elder is speaking in court, it is understood that they are to speak with honesty and integrity. This session is to try to see what common understanding there might be.

Ms. Craft noted that it would be ideal to do as much as possible in advance of trial (e.g., for what purpose are we qualifying Elders; resolution of potential disagreement on qualifications). It might be useful to have outside sources talk about their credentials, such as an advisor to the court or a peer advisor. She has worked with the Manitoba courts and arranged off-site meetings to have a ceremony at a lodge, as well as informal discussion with the Crown, clerks, court to discuss the role of Elders. The goal is to have Elders sit as a panel to discuss oral history. This is important, as there is an order in which Elders speak, and they build on each other's perspective. It is important to understand how knowledge is kept and shared. Some elders speak to some subjects but not others. Also, there is value in having some evidence presented by one Elder and then endorsed by another (value of repetition). There is a need for substantive equality rather than merely formal equality.

Mr. Devlin noted that the initial efforts of this Committee aimed to stay within bounds of universal rules of Court. However, oral history is very special and should probably have its own specific rules. Courts have adopted procedures on an *ad hoc* basis – it might be possible to look at how they have done this and propose a model for the court. There is a difference between a usual expert (e.g., historian) and the role of Elders in providing oral history. So much of oral history is tied to the essence of the community. The authority to tell this story is very different than standard expert witness. We should not try to fit Elders under the expert witness rules, as it is not a good match. Elders are something more than regular lay witness, and something different than an expert witness. Guidelines need to reflect the 'self-defining' nature of authority from within the community, and the guidelines need to be rigorous on this point. The Supreme Court says that oral evidence should be able to stand on its own, and yet many courts require corroboration. There was reference to Mr. Gary Campo's paper (regarding the Tsilhqot'in case in Williams) where oral evidence was used to fill in gaps in the documentary record. Guidelines need to be specific about particular types of oral history / context and need to avoid narrowing the oral history standards from the Delgamuukw context. Each community will have its own tradition of oral history. There may be very specific traditions that should be recognized within guideline framework, rather than narrowly following precedent.

Elder Stephen Augustine noted a distinction between oral history and oral tradition. Elders are sometimes asked to distinguish these, and are sometimes told they can speak to what they have seen and experienced and heard (oral history). But for oral tradition (dances, ceremonies), there is often a great deal of academic criticism. He has often been asked to justify how Elders received their language.

Justice Mandamin characterized the underling question: *how do we comprehend the aboriginal perspective in court proceeding?* To get the aboriginal perspective, we often turn to the Elders. But how do we treat the Elders in terms of receiving that knowledge? The court process, being adversarial, asks questions (e.g., are they qualified to receive evidence, testing of evidence in cross-examination, etc.). This is a Eurocentric way of finding truth. These methods don't work as well from the aboriginal perspective. It may be seen as offensive, it may break up knowledge and distort it, etc. This may not be the right way to proceed. The key issue is that there is no separation of history and tradition.

Mr. Nahwegahbow added that this distinction may not be as important to the Elders. Some knowledge is hear-say, some is from direct experience. Should the guidelines address only oral tradition or also oral history? We may wish to explore this further.

Ms. Ring referred back to the opening question by Justice Mandamin ("who is an elder?") There is little guidance in the case-law or academic literature. We need to have some common understanding of who qualifies as an Elder. Are there certain criteria or elements that would be common throughout communities, or does it vary from community to community? Guidelines could either identify criteria or else a process to follow on case by case basis. Often it has been said that age is not a defining factor, but more important is knowledge of tradition and of the community. Also, regarding the question whether an Elder has authority, she referred to Justice Vickers' criteria from the Williams case (see page 14 of the General Literature Review), though noting that he wasn't intending to set down criteria to apply to all cases.

Mr. Healey endorsed the comments of Ms. Craft and Mr. Devlin, but would go further. He doesn't believe that Elders should be qualified or categorized, because this serves to exclude evidence and results in an unbalanced process. Elders should be presented by the community and can then provide evidence, which can be reviewed on cross-examination alone, as any other witness. It is problematic to make a distinction between oral history / tradition, as this is used to exclude evidence. Evidence should not be excluded on these narrow distinctions. These are not 'experts' in the sense that it is used in court; they are lay witnesses. He stated also that there should be full disclosure to the Crown. Many of these cases are foreign to the Crown, and they should not be taken by surprise. Without oral history evidence, and especially from many sources, you can lose case (such as the Federal Court of Appeal decision in Benoit on a tax appeal, which expressed concern regarding the limited number of Elders giving evidence).

Justice Lemieux noted that the preference of the rules committee was similar: it would not qualify Elders as experts, so there would be no advance qualification as with formal

experts. But the rules would be available where applicable. So, Elders would be treated as lay witness in terms of procedure, and issues of qualification could be addressed before trial (e.g., what is your background, how did you get this knowledge, etc.). An Elder is not an expert under the Rules, but is something special.

Mr. Healey agreed, but gave an example of an Elder who was put forward to give evidence, but then there was cross-exam on qualification. The Crown argued that there was another elder 20 years older, and so the first Elder could not provide the *best* evidence. In his view, this is a futile process that is used to exclude evidence.

Ms. Ring noted that oral history is hear-say evidence, and so there is a need to cross the admissibility threshold. There was only one out of 15 cases in Federal Court in the jurisprudence review where an Elder's testimony was excluded.

Ms. Venne described the process of an Elder coming into court and what happens in preparation. There is discussion between counsel and party to consider possible Elders who might be available to speak, and then there is some ceremony long before for the Elder to prepare. At court, questions are framed in English, and then interpreted. Interpreters must understand the question properly. Elders often work with familiar interpreter, because there is an issue of trust whether the person will transmit it properly to the Court. She told an old story of the Northwest Mounted Police who once had asked a community for a representative to guide them very far north. A young man was selected who had heard from his father and grandfather how to get there, but had never been himself. There is a long preparation process within the community for identification of the questions and then of the Elders to speak to the question.

Ms. Twinn noted that it is important to keep the system simple, flexible, open, and inclusive. The perception is that there seems to be a lot of fear around oral history evidence. She gave a story from a very senior lawyer about practice decades ago: there was *communication* between the lawyers, and if there was a problem, they tried to speak with each other and have the parties communicate with each other. She spoke also of creation of a web site to help share understanding of the Elders, who would likely welcome the opportunity to meet with counsel for the Crown. She noted also the doctrine of reconciliation – in the Sioui case, it came about from dialogue between counsel for Mr. George Sioui. Reconciliation exists both in the judeo-christian perspective as well as the aboriginal. She expressed concern with development of complex rules and compartments that will further complicate a trial. It is not up to judges to fix everything.

Elder Francois Paulette noted that "in our house, we have protocols that are followed." He added that "we leave our house to go to court, but we decide who is qualified from our house to speak … we do not question who is qualified as a judge to decide." An Elder may be qualified but may not wish to leave to go to other house, but if he accepts, arrangements are made in our house. When the Elder arrives in this other house, the Crown should give tobacco and then ask questions. The same protocol is being followed, and so there is no disagreement. The gift of tobacco is like swearing on the bible – it provides a guarantee. The court has much flexibility and can make the system work. "In

court, there is no need to ask if the Elder is qualified - we have already done this." If the questions are not in the Elder's reality / thoughts, he may be silent.

Elder Morris Little Wolf agreed with this common sense proposal. He felt that Elders are victims of the problems – *where do elders fit?* "We are a different culture, which can not be taken away." He spoke of four phases in life of learning the wisdom of Elders, and at each stage providing guidance to the younger generations, teaching of the experience of "how we live." Elders are available to give back these teachings. When Elders come to court, they can only come with the truth, "which you don't have." Only two people can change an agreement with the treaty, not one. If you do wrong one day and are not honest, it will affect you and your children – that is our teaching. He described a stand-off on a reserve for two months with the courts, government, and police. One Elder became involved and resolved the issue in 4 hours.

Elder Gordon Lee noted that he was hesitant to speak in English – when in Cree, it is very easy to speak. He noted that he is an Elder, but does not consider himself to be an expert. It is the community that chooses Elders. He spoke of his grandfather, who taught him ceremonies. Tobacco is a symbol of respect, given as an offering before proceeding with ceremony. He then spoke of the eagle feather, and told the story of crow, originally white, who was asked by the Creator to fly around the world but told not to eat anything. It was found later in the water, black, because it did not follow what was asked. The eagle was asked to do same thing, and because eagle followed Creator's request, eagle will always be held in great respect. You have to prove yourself as an Elder – people don't just accept you. The role as Elder is to pass on what is learned to the younger generation, to prepare them for the future. We are guided by certain prophecies that have been received from Elders. For instance, he was told by his grandmother never to reject food, for future generations will have times of starvation. We must keep our culture, our sweet-grass, and our ceremonies. An Elder noted that even an atheist would believe 90% of our beliefs, because it is common sense. For instance, the word for water ("nipi"), is derived from 2 words meaning "I am life." Regarding dates, we have a different type of calendar – but oral history is reliable. Someone once said that the bible is written *oral history.* He went to residential school for 8 years, and yet not once did the priest say to respect creation, and the same thing was true in later school, and yet this is part of our tradition. Oral history is valuable knowledge – we have to respect all creation and co-exist if we wish to survive.

Justice Lemieux notes that the problems / issues have generally been identified. We need to find something simple, flexible, open. We want to avoid the old system of trial by ambush, an aspect of the old adversarial system – this is why we have all these new rules (case management, disclosure, discovery, pre-trial conference review of issues, etc.). There has been recognition by the Department of Justice that things have changed. What the Supreme Court says then informs the procedures and the Department of Justice approach. The question is how to modify procedure, but within an adversarial system.

Mr. Stevenson agreed with the perspectives presented by Ms. Venne / Ms. Twinn regarding reconciliation. He then added two comments:

- oral evidence is presented for various purposes: view of aboriginal law – a constitutional voice, view of aboriginal life, evidence of certain facts probative of an issue in the case
- there is a need to balance respect for Elders with the obligations on all counsel regarding the need for evidence that is relevant to the case

He found the internal community process for the 'vetting of Elder' to be entirely reasonable and should not be challenged by Justice counsel. However, there is a need for a process long in advance of trial for Justice to be aware of this vetting process and the content of the evidence. Will-says statements and appropriate cross-examination fit into a process for all counsel to do their job, but should not get in the way of hearing wisdom of Elders.

Mr. Healey agreed that will-says, etc. can be provided. However, he has been in cases where Justice counsel objected to such a vetting process as is proposed. Lawyers should work together to ensure that relevant information is before the court. The key issue is that the proper evidence should get to court, and Elders' evidence should not be excluded on technical rules. The Court and counsel can address disclosure, though there is only so much that can be provided in advance – if necessary, the Court can make common sense ruling on the issue. Ambush should have left system years ago.

Ms. Craft suggested that we move on from possibility of Elders fitting in the classic expert witness category under the Rules. It seems that this is the consensus view.

Justice Mandamin responded that the aboriginal community evolves over time. Some people learn through traditional methods from Elders, though others learn in different ways, through research in documents, archives, etc. In 20 – 30 years, there may be new kind of Elder with a kind of knowledge that is gained through community as well as through archives.

Mr. Nahwegahbow would not be so quick to exclude Elders from the expert witness category. If the only choice is either lay witness or expert witness, it might be preferable to use the expert witness category. Elders are often asked to give evidence about laws, customs, etc. (such as occurs in other legal contexts with experts on the law of another state). They are Constitutional voice about societies that pre-existed.

Mr. Winogram proposed to raise some of the challenges that face any court in dealing with this issues, and so spoke of his experience with the Cold Lake inquiry (20 years ago) before the Indian Claims Commission and presentation of a story by an Elder. The Commission travelled to different communities for information sessions. At the end, the Elder stated to counsel that 'this is my story and I won't change it no matter how much you stare at me.' At the time, he had no idea of the frame of mind of the witness or of the potential obstacles for the story to come out in court. The challenge that faces the Court through the specific claims tribunal to get that information and ensure that as much information is received and to create an appropriate environment, through guidelines or rules or environmental considerations to put the Elder in the best position. For Elders, this

is a unique consideration, and should be considered by the Guidelines: trying to create that environment for Elder witnesses.

Mr. Calliou spoke of the aboriginal house and its relationship with the Crown, and the need to re-establish a treaty relationship. This will help create an appropriate environment. There is trust in the government to keep its promises, but the government also takes the role of prosecution. He also expressed concern regarding the language of "elders as opposed to *normal* experts", as if Elders are not normal. It was not intended to be disrespectful, but we need to be care to create appropriate environment. We should be careful not to spend so much time dissecting words / categories, but should focus on *spirit*. There is a need for a common understanding, but from what house?

Ms. Tobin Oats asked whether all present should not be listening to each speaker, especially to the Elders, noting that there have been a number of "side conversations" that seem to be disrespectful to the Elders.

Justice Mandamin notes that everyone considers this to be important, as shown by their attendance.

Mr. Gingras thanked the Elders for their teaching: this is the foundation on which we work. He has seen some evolution of practice over the years, and looks forward to the guidelines.

Mr. Healey made a suggestion for consideration by the Department of Justice regarding disclosure. The Department may wish to explain what would help them (e.g., a summary of collective evidence, other disclosure issues, etc.).

Ms. Ring recommended review of her discussion paper – about half refers to pre-trial issues. She noted that there are different practices between counsel (private / public). In some cases there is difficulty in getting information about oral evidence. She also noted the settlement process – the oral evidence is often missing, and so it is difficult to provide her client with a full recommendation.

DAY 2 - AFTERNOON

Justice Lemieux asked the IBA and CBA to review the Department's feedback on the Phase I practice guidelines and provide their own comments – a teleconference will then be organized to conduct a final review. The guidelines will then be updated and circulated for final approval by each group, with the goal being to have guidelines in place by next meeting on June 11.

Ms. Ring commented on the issue of can-says and will-says, with reference to the more general issue of how we do pre-trial discovery. The typical way is through documents or oral discovery, but documents are not always feasible, given that oral history has not likely been written. The discovery process often has a non-Elder involved to represent the

band, though s/he is not always able to provide some of the information – as a result, we have used will-says.

Mr. Healey reviewed Kathy's paper and commented on the issue of assertion of privilege by the plaintiff. In this case, the Court should be free to make appropriate decisions, possibly excluding evidence or providing time to respond later. The disclosure obligation of will-says is feasible, though sometimes difficult; but it should be attempted. With respect to footnote 51 in Kathy's paper, he agrees with the content for will-say statements, as these help to prepare for the hearing, and appear to be consistent with jurisprudence on will-says. He notes the reference to a CBA paper arguing for assertion of privilege, though doesn't believe that a plaintiff can both assert privilege and also use the evidence in the trial.

Ms. Craft noted that the concern regarding privilege is for the possible use of evidence in other for a.

Mr. Healey questioned what a lawyer can actually provide in a will-say statement. Counsel can make best effort so as to prevent issue of ambush at trial. However, it is important for the judge to ensure that the relevant evidence that is needed is provided. If litigation privilege is claimed by either side, there are other ways to ensure the proper evidence is available. If you get to trial and there is an "ambush", the judge can adjourn on that issue to allow opposing counsel to address the gap. So, the judge has flexibility to address these issues with the existing rules.

Mr. Augustine noted that he has been asked to prepare a will-say statement for pre-trial discovery, and presented something that was 22 pages, but he had little time to prepare. In testimony, he expanded on this with a "full-blown" version. The will-say statement was challenged with massive evidence from the Crown, which had much more time to prepare documents than he had. He questioned whether this process is fair.

Justice Lemieux reiterated that the principle under all of these proceedings is fairness, justice, but timing is addressed on case by case basis.

Justice Mandamin added that you can say what the witness *can* say but not what s/he *will* say. Elders aren't constrained by an academic discipline. When an Elder takes the stand, counsel doesn't control what the Elder will say, but only knows the general direction. You have to let the Elder speak without interruption, allowing the judge to understand the full picture. There can be a significant gap if there is a written response to the can-say, with no meeting of the issues – there will be no reconciliation of different points of view.

Mr. Devlin noted that the practice guidelines are to better reflect an aboriginal perspective in the court process. The CBA section members' comments indicate that use of will-says / can-says should not be the same as for other proceedings. It seems self-evident that we need guidelines for aboriginal cases, because universal guidelines tailored for IP / maritime cases are not always relevant. We need appropriate standards for disclosure. The CBA section agrees that can-say statements / disclosure is appropriate,

but a can-say statement is a written document, whereas oral testimony cannot be easily captured in written form. The can-say statement should not be used to constrain oral evidence on the stand. There is an assumption that the rest of the rules will allow presentation of evidence in proper context and with due respect. Cross-examination should not be an examination for discovery transcript. Use of the can-say statement should reflect the unique nature of this evidence.

Ms. Lickers provided some perspective of commission counsel with the Indian Claims Commission inquiry process with Elders. The first point of distinction, compared to court procedure, is that will-says for oral history were introduced for the purpose of the relationship of the parties. The will-say is a discovery tool, allowing counsel to prepare themselves. However, the process for preparation of will-say statement was as important as what it said. The commission was a travelling commission, with hearings in the community. Counsel for both government and First Nation were present for the initial hearing of the will say testimony and preparation of the will-say statement. This allowed counsel to meet before the full hearing, explore the purpose of the proceeding, discuss rules of procedure, etc. All of this was part of the will-say preparation process. It was not to be used for cross-examination purposes. Commission counsel had the role of preparing a summary of what was said, and this provided a first-hand opportunity for the Department to hear what was said. What was said at the full hearing would supersede what was written in the will say. Questions were proposed by counsel, but there was no cross-examination. Only commission counsel were involved, with questions from other counsel given to commission counsel. This was a lot of work, but it was very useful to develop a close working relationship among counsel. If there were further questions arising from the will-say, commission counsel would return for further discussion. The will-say discussion was audio-recorded for future reference. In some cases, an Elder died between the will-say presentation and the final hearing, and then the original recording allowed some preservation of their knowledge.

Ms. Ring noted that this is a challenging issue. As a litigator, it is difficult to accept that you can not use the will-say statements to establish facts. *Is it still possible to prepare properly?* The Department could perhaps consider a *sui generis* category, but this will require further consideration / discussion.

Justice Mandamin noted a similar *but opposite* reaction from one of the Elders regarding the constraints that would be imposed by a restrictive will-say statement.

Ms. Twinn agreed with the practicalities of preparation of will say statements with Elders – protocols, discussion, etc. What is said one day may be expanded later in the witness stand. However, there is a key practical aspect: cost. It is very difficult when the Crown is funding a large legal team. It would be useful if the Crown were to agree on facts at the front-end of the process, rather than challenging all the facts, which then requires the plaintiff to prove everything. To what can we agree regarding facts early on in process? This might be where the oral evidence will-says might help in building solutions. She does not agree with approach by the Crown to seek to strike evidence unless it is included in a will-say statement.

Mr. Stevenson responded that he should review these suggestions within the Department and then return to the table.

Justice Lemieux noted that there is discretion for the trial judge – if there is a large deviation between will-say statements and subsequent oral evidence, the trial judge could accept the evidence but adjourn. The judge can do what is fair in the circumstances, but normally would not exclude evidence.

Regarding the issue of cross-examination of Elders, he reviewed the summary from the 'issues' paper: "The cross examination of aboriginal Elders is often a source of concern due to the status of the Elder within their community and the significance of the information which they are sharing with the court. As a consequence, attacks on the content of the Elder's testimony may be perceived as attacks on the very beliefs of the community itself. The use of cross-examination as a means of discrediting an Elder may result in personal humiliation for the Elder and an undermining of their cultural teachings." He then noted the numerous suggestions for addressing these concerns are discussed in the literature:

- exempting Elders from cross-examination (though noting that this would not likely be supported on appeal)
- approach used in the Indian Claims Commission Inquiry Process
- the involvement of a cultural interpreter
- development of a special preliminary inquiry for Elder testimony including relocation to a site if necessary (there is great willingness on the part of the Court and Crown to go to community to hear evidence)
- the formulation of a list of common principles, incorporation of community protocols and ceremony
- use of community standards for assessment of testimony
- the use of a helper for the Elder
- testimony from community members to introduce the Elder
- sharing of customs, traditions or protocols associated with oral history to permit the necessary accommodation.

Thus, there are numerous alternatives – the Federal Courts Rules are very flexible for all these issues.

Regarding the issue of Expert Assessment of Elder testimony, Justice Lemieux then reviewed the summary in the 'issues' paper: "Experts have been used in Aboriginal litigation to challenge the reliability of oral history evidence as presented by Elders. The expert may critically assess the way in which the oral history was passed on from one person to another or the consistency of the information provided with previous versions or other accounts. These litigation strategies have been identified as areas of concern in aboriginal litigation due to the importance of oral history within many aboriginal communities and the revered role of Elders. If assessment of Elder testimony is undertaken in a manner inconsistent with their status in their communities, the Elder may suffer public humiliation which can affect the community as a whole." Various suggestions for addressing these concerns have been provided in the literature. They

include the use of a "friend of the Court" chosen by the parties to serve as an advisor on certain factual matters, use of a court appointed expert chosen by the judge, an independent panel of experts and/or the involvement of "local experts". There has been considerable reform in the Federal Court rules, such as the use of panels, joint experts, assessors, and court-appointed experts to do assessments. These are novel techniques that have come to the fore, many already having been used for some time in other jurisdictions (e.g., Canadian Competition Tribunal, Federal Court of Australia, etc.). There is a lot of flexibility – important to get the information to the judge so that he / she can make the best decision.

Elder Francois Paulette spoke about language as the key that unlocks the past in his "house," and the need to bridge the language aspects in the Courts. He noted in particular that there are numerous terms in court language that don't exist in aboriginal languages (e.g., hear-say / can say – this does not exist in his language). He gave an example where he was asked at the Benoit trial how he learned some information, and described a situation where knowledge was transferred in an unusual but real way. He also mentioned a process of fasting to gain understanding, not just of this world but of the other world. A non-Dené cannot understand this. An individual who has fasted and lived a clean life for many years, without drinking, etc., this person may be an expert – but their knowledge cannot be defined narrowly. Elders need to be careful regarding questions, as there are many protocols that must be observed – if not, he may not answer. Elders who have sobriety and are clean, their memory expands far back. If you drink, you forget the past. The experience of Elders is different. We need to recognize this. It is important to expand your consciousness, learn more about language, protocols, and become educated. Otherwise we shall be here with the same issues many years later. He gave thanks to Indian lawyers and judges. I have always lived in bush, never in city – what you are doing here is to be admired. You are trail-blazers, doing something that cannot be imagined.

Elder Stephen Augustine requested copies of the discussion papers for the Elders to be better prepared for subsequent meetings.

Ms. Craft noted that the CBA can get comments on the four issues along with recommendations for discussion at the next meeting, and suggested that perhaps others can do the same.

Mr. Calliou acknowledged the comments of Mr. Paulette; that it is important to honour the life that you live. Many people still live on the land, but there has been considerable shifting of their minds and spirits. With residential schools, laws, etc. - sometimes this is labelled colonization. Many live in both houses, which is a struggle. It is important for people to hear a validation of the Elders for their work, especially those who live in urban centres. And it is important for us to build bridges, as elder Little Wolf said, to step outside our box, and stop by to visit. If you are in Calgary, stop for a day to share and better understand the ceremonies of our peoples. It is important to focus on creating positive structures rather than on argument. The underlying principle beneath the adversarial judicial process is *justice*.

Ms. Metallic noted that we have started something very important here the last couple days: we have asked the Elders to join us to learn more about the process and how it affects them. The creation of relationship is important, providing a possibility of turning the corner in how we address disputes in our country. She noted that the IBA is not in a position yet to provide substantive comments, but will continue discussions with the Elders to set the direction for the future. She hoped that this process will continue. It deals not only with the *history* of our people but also the *future*.

Ms. Ring noted that the Department of Justice is agreeable to continue canvassing colleagues for further discussion in June.

The Chief Justice noted that we shall circulate the reference documents more widely. He then thanked Mr. Paulette for his comments – "what we are doing here is for those who succeed us." He also proposed a pilot case that we could use to put some of these ideas to work – this would be good laboratory. Finally, he thanked everyone for their participation.